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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. [redacted]

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOE SEGURA, JR.,

Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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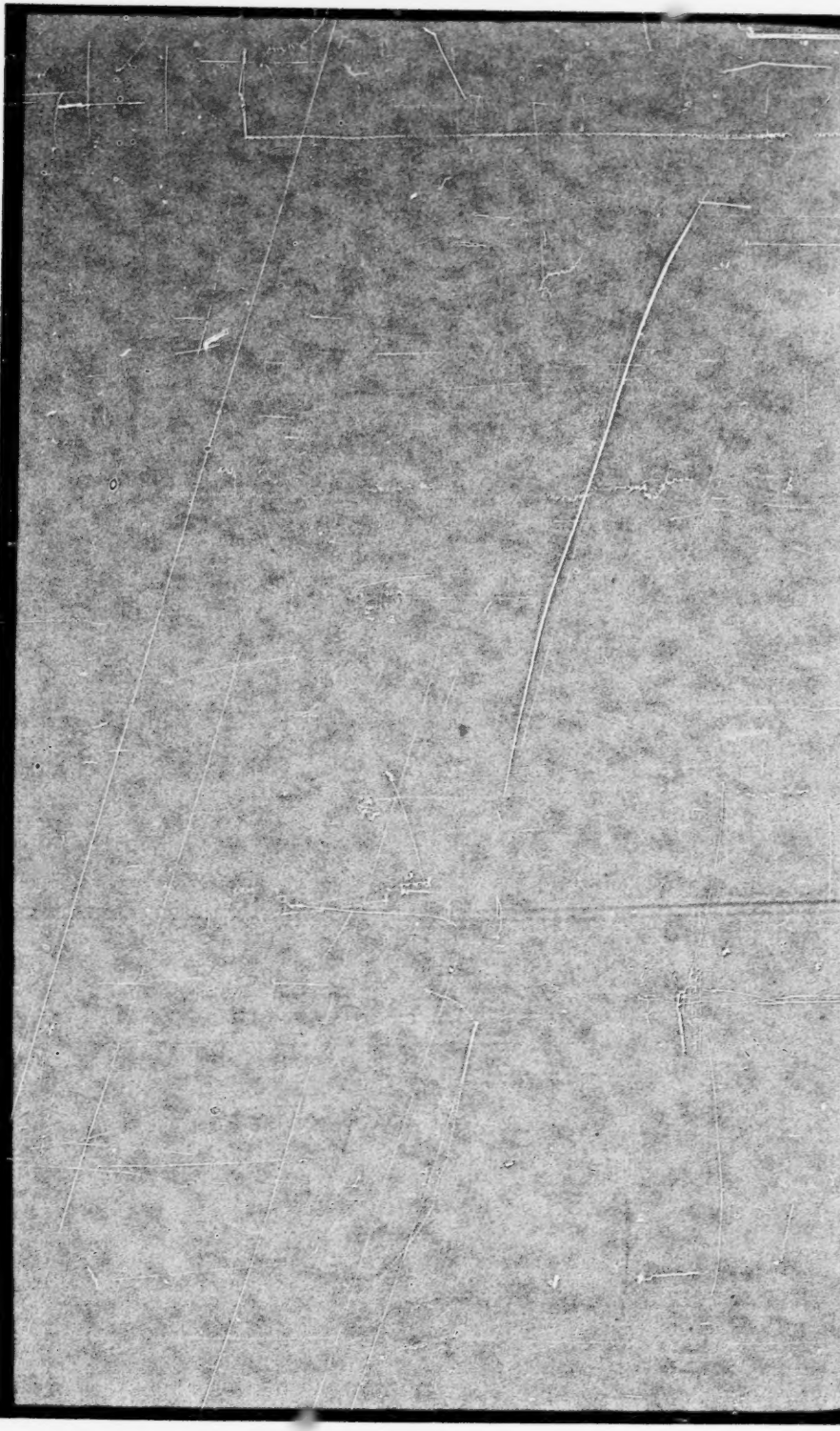

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No.———

UNITED STATES OF AMERICA, Plaintiff-Appellee,
vs.
JOE SEGURA, JR., Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The defendant-appellant Joe Segura, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on September 9, 1974.

OPINION BELOW

The opinions of the Court of Appeals and the District Court for the District of Colorado appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 9, 1974. A Petition for

Rehearing was denied on October 9, 1974. A Motion for Enlargement of Time to File Writ of Certiorari was granted by Mr. Justice White on November 12, 1974 and as required, this Petition is filed before December 8, 1974. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in denying the defendant-appellant's motion for acquittal because the evidence offered at trial was insufficient to support a conviction under the relevant statute.

2. Whether the Court of Appeals erred in sustaining the trial courts admission of certain evidence seized pursuant to the execution of a search warrant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INCLUDED

United States Constitution:

Fourth Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

26 U.S.C.A. §5861

It shall be unlawful for any person . . . . (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; . . . .

26 U.S.C.A. §5871

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000.00, or be imprisoned not more than ten years, or both, and shall become eligible for parole as the Board of Parole shall determine.

18 U.S.C.A. §2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE

On April 29, 1973 an affidavit was presented to Eugene T. Halaas, County Court Judge for the County of Pueblo, by a Daniel B. Sneil. That affidavit indicated that the affiant had arrested an individual named Delano Rolando Charles for violation of narcotics laws on the same date. It further indicated that prior to the arrest, affiant observed Mr. Charles and another male in a vehicle parked behind the Petitioner's apartment at 1911 East Evans, Pueblo, Colorado. Affiant then observed Mr. Charles leave the vehicle, walk to the entrance of the apartment above-mentioned, at which time the officer observed the Petitioner, who was known to him, admit Mr. Charles to the apartment. A short time thereafter, Mr. Charles emerged from the apartment and returned to the aforementioned vehicle. Mr. Charles got into the vehicle and the officer observed in his possession sev-

eral balloons and a plastic baggie in his hand. Mr. Charles next, according to the affidavit, handed them to the driver of the vehicle and, after a short conversation, both Mr. Charles and the driver drove from the apartment and were subsequently arrested.

Paragraph No. 2 of the affidavit indicates that after the arrest of Mr. Charles on April 29, 1973, he related to the affiant that he had been buying heroin from an individual known to him as Joe Segura, the Petitioner herein, for approximately two years at an interval of three to four times per week. He further indicated that he went to the apartment at 1911 East Evans, Apartment E, Pueblo, Colorado, on April 27, 1973 where the Petitioner was living with a female party. While there, Charles stated that he purchased an amount of heroin from Mr. Segura, although no amount is indicated in the affidavit. Again, on April 28, 1973, Charles indicated he had purchased an amount of heroin from Mr. Segura, at the same location, again no specific amount being indicated in the affidavit. Mr. Charles further related that while he was in the kitchen of the above-referenced apartment, he observed a number of plastic wrapped baggies of green vegetable substance, and that Mr. Segura related to him that the substance was marijuana. Charles told the affiant that on every occasion he had been in the aforementioned apartment, he had purchased heroin from the Petitioner; the Petitioner going into the bathroom and returning with heroin in whatever amount the affiant desired. Mr. Charles also indicated that on April 29, 1973, the date of his arrest, while in the apartment, Segura went to the bathroom and returned to the kitchen with a quantity of heroin in balloons that was sold to Charles for $700.00. Subsequently, Mr. Segura took the remaining

herein back to the bathroom. No indication was made as to whether the drugs which provided the basis for Mr. Charles' arrest were in fact the same drugs that he had purchased from the Petitioner that evening.

Paragraph No. 3 of the affidavit continues that the affiant, Daniel B. Snell, of his own personal knowledge observed Joe Segura, the Petitioner herein, at the location of 1911 East Evans, Apartment E, Pueblo, Colorado, and had spoken with the Petitioner sometime within the previous two months at which time the Petitioner related that he lived in the aforementioned apartment. Paragraph No. 4 indicates that Daniel B. Snell, the affiant of his own personal knowledge knew that Joseph Segura and Cynthia Segura were arrested on September 2, 1972, for violation of narcotics laws and that Court action was pending pursuant to the September 2, 1972 arrest but that nothing had transpired as of that date. It is interesting to note that nowhere in the affidavit or the search warrant was Daniel B. Snell identified as an officer of any police force, although during the trial he testified that he was in fact a member of the Pueblo Police Department and so employed at that time.[1]

Testimony at the trial revealed that the search warrant issued pursuant to the above-referred affidavit was apparently executed in the early morning hours of April 30, 1973. At that time, Officer Snell identified himself as a police officer for the City of Pueblo[2] and indicated that, after giving the Petitioner a copy of the warrant, he proceeded to search the apartment referred to as 1911 East Evans, Apartment E, Pueblo, Colorado.

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[1] Record Vol. I, p. 31.
[2] Record, Vol. III, p. 8.

Officer Snell indicated that while he was searching the "main bedroom", he found a black plastic wrapped container with seventeen metal screws attached to it with black tape, and at that time he believed it to be a destructive type device.[3] At the time the device was found, the Petitioner was seated in the living room, although an Officer Koncilja had, according to Officer Snell, gone to that bedroom earlier and had brought both the Petitioner and Dorothy Segura from the bedroom and asked them to sit on the living room couch during the search.

At the trial, Officer Snell described the bedroom in which he indicated there was an average sized bed against the south wall and a long dresser with a mirror which he believed to be against the east wall of the apartment, approximately 6 feet long, an upright dresser which was next to it approximately 4 feet in height. The dresser approximately 4 feet in height was the one on which the destructive device was found. Officer Snell testified that the destructive device was not surrounded by anything or covered by anything but did indicate there was a clock radio, a jewelry box and some paper on the dresser.[4]

On cross-examination, the officer indicated that he believed the object he referred to earlier on the dresser was a clock radio, indicating that it was 8 to 10 inches long and approximately 6 inches high. He also indicated that there was a jewelry box on the dresser but couldn't recall the dimensions and indicated that there were also some papers, a letter and a phone company receipt, along with other pieces of paper on top of the dresser, although these were not identified as belonging to any specific individual.[5]

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[3] Record, Vol. III, pp. 9-10
[4] Record, Vol. III, p. 11.
[5] Record, Vol. III, pp. 17-18.

When asked at what point in time during the search the destructive device was found, the officer couldn't relate whether it was at the beginning of the search or whether he had gone into the bedroom more than one time prior to finding the destructive device in question.[6]

Dorothy Segura, the Petitioner's companion the evening the search warrant was executed, in her direct testimony, indicated that the destructive device had been seen by her approximately a week earlier when an individual identified only as "Frenchie" had brought it to the apartment during an evening the week prior to the execution of the search warrant. "Frenchie" was in the company of a William Abiliar, Dorothy Segura's brother. The two men stayed at the apartment only a short time. Mrs. Segura indicated that "Frenchie" took the device out of one of his pockets and, although she didn't pay much attention to it, she recalled the Petitioner indicating to "Frenchie" to put it away.[7]

Dorothy Segura indicated that the next time she was aware of the device being present in the apartment was a few days subsequent to that time when she was cleaning the living room. She discovered the device underneath and on the left side of the couch, hidden from view.[8] Dorothy Segura further indicated that she was unsure as to the exact nature of the device and picked it up. Being afraid that her small child, who is about ten, would play with it, Dorothy Segura placed the device in the bedroom on a dresser, behind the stereo and out of view. Mrs. Segura indicated further that she was intending to call the fire department to have the device removed, but

[6] Record, Vol. III, pp. 17-18.
[7] Record, Vol III, p. 62.
[8] Record, Vol. III, p. 63.

it had subsequently slipped her mind and she had forgotten that it was present in the bedroom, behind the stereo.[9]

The night the search warrant was executed, Dorothy Segura indicated that it was approximately two hours after the entry by the police into the apartment before the destructive device was discovered.[10] On cross-examination, Dorothy Segura testified that she did not know whose clothing was in the dresser on which the destructive device was found but indicated it was full of female clothing.[11] The jury returned a verdict of guilty on October 23, 1973[12] and the Petitioner was committed to the custody of the Attorney General or his authorized representative for a period of five years confinement.[13] Petitioner filed a Notice of Appeal with the Court of Appeals for the Tenth Circuit. The case was heard on August 20, 1974 and an opinion affirming the lower court's ruling was entered on September 9, 1974. A Motion for Rehearing was denied October 9, 1974.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS IN HOLDING THAT THE EVIDENCE OFFERED AT TRIAL WAS SUFFICIENT TO SUPPORT A CONVICTION UNDER 26 U.S.S. §5861(d), and 5871 18 U.S.C. §2 APPEARS TO BE IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, OTHER

[9] Record, Vol. III, p. 65.
[10] Record, Vol. III, p. 66.
[11] Record, Vol. III, p. 70.
[12] Record, Vol. I, p. 21.
[13] Record, Vol. I, p. 26.

COURTS OF APPEALS, AS WELL AS ITS OWN PREVIOUS RULINGS.

In *United States v. Freed*, 401 U.S. 601 (1971), Justice Brennan, in his concurring opinion, at page 614 indicated:

> In regard to the first two elements of the offense, (1) possession of items that (2) are hand grenades, the general rule in favor of some intent requirements finds confirmation in the case law under provisions replaced by the present amendments. Cases held that a conviction of an individual of illegal possession of unregistered firearms had to be supported by proof that his possession of unregistered firearms was "willing and conscious" and that he knew the items possessed were firearms *E.g., Sipes v. United States*, 321 F.2d 174, 179 (C.A. 8, 1963); *United States v. Decker*, 292 F.2d 89 C.C.A. 6 1961). Congress did not disapprove of these cases, and we may, therefore, properly infer that Congress meant that the government must prove knowledge with regard to the first two elements of the offense under the amended statute.

The record at trial reflected that although Segura was a resident in the apartment wherein the destructive device was found, there was no indication that Segura ever had any occasion to use the dresser on which the hand grenade was found. The articles found within the vicinity of the dresser would support such indications. The testimony at trial indicated that on top of the dresser upon which the destructive device was found were a clock radio, a jewelry box, some papers and a phone receipt. No keys, change, billfolds, watches or any of those items custom-

arily placed on a dresser when one is removing his clothing for the night were found, although the Petitioner and Dorothy Segura were roused from bed during the period the search was being conducted.

In addition, the only testimony elicited with regard to possession of the dresser indicated that the clothing in that particular dresser belonged to a female, and not a male individual. This would certainly negate the inference that Segura had "willing and conscious possession". A showing of some exercise or intent to exercise dominion or control over the device is certainly necessary to establish defendant's possession. *Murphy v. United States*, 18 F.2d 509 (8th Cir. 1927). Indeed, in the instant case, it does not appear that there was a connection drawn between the petitioner and the dresser on which the destructive device was found sufficient to indicate that he was in "willing and conscious possession". Thus, the Court of Appeals erred in holding that the mere presence in the apartment was sufficient to establish possession.

In fact, the cases in several other circuits hold that the mere presence of an individual in a dwelling is insufficient to establish possession. Possession may be either actual or constructive. *United States v. Black* 472 F.2d 130 (6th Cir. 1972), *United States v. Holt*, 427 F.2d 1114 (8th Cir. 1970). Actual possession exists when a tangible object is in the immediate possession or control of the party. *United States v. Craven*, 478 F.2d 1329 (6th Cir. 1973). Constructive possession exists when a person does not have actual possession but intead knowingly has the possession and the intention at a given time to exercise dominion and control over an object either directly or through others. *United States v. Viragalia*, 441 F.2d 1295

(5th Cir. 1971); *United States v. Burch*, 313 F.2d 628 (6th Cir. 1963).

The proof of control or ownership of property in which contraband is found is a strong circumstance tending to prove knowledge of the presence of such contraband and control thereof. *Arrellanes v. United States*, 302 F.2d 603, (9th Cir. 1962). However, mere control or ownership of the premises, mere proximity to the contraband, mere presence on the property where it is located without more is insufficient to support a finding of possession. *United States v. Gary*, 447 F.2d (9th Cir. 1971); *Amaya v. United States*, 373 F.2d 197 (10th Cir. 1967) *cf. United States v. Craven*, 478 F.2d 1329 (6th Cir. 1973). Thus possesion of the residence without more is insufficient to establish possession of all the contents of the house. Consequently, the Court of Appeals erred in upholding the Petitioner's conviction since there was no other evidence linking him to possession of the hand grenade other than he had possession of the apartment.

2. THE COURT OF APPEALS' DECISION IN UPHOLDING THE DISTRICT COURT'S HOLDING THAT THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS VALID IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT.

This Honorable Court is undoubtedly familiar with a long line of cases which indicate the requirements of an affidavit which is the basis of a search warrant, beginning with *Aguilar v. Texas*, 378 U.S. 108 (1964) and the further clarification of that case in *Spinelli v. United States*, 393 U.S. 410 (1969). In order for a search war-

rant to be within the constitutional limits, the affidavit supporting such warrant must satisfy a two pronged test. As stated in *Spinelli v. United States*, 393 U.S. 410 (1969), the affidavit must set forth the underlying circumstances necessary to enable a neutral and detached magistrate to independently judge the validity of the information and reach a conclusion as to whether or not there exists probable cause. Secondly, the affiant officers must further support their claim that the information gained from the informant was credible or that his information is reliable, so that the probative value of his statement may be assessed independently by a magistrate.

It is the second prong with which we are concerned in the instant case. It is an absolute necessity that an informant whose information is relied on for the issuance of a search warrant must have his reliability in some way substantiated prior to the magistrate issuing justification for the search warrant based in part on his report to the affiant officer, *McCray v. State of Illinois*, 386 U.S. 300 (1967); *Spinelli v. United States*, supra. In the instant case, the informant upon whose information the affiant relied in preparing the affidavit, as well as the reliance placed on the informant's statement by the judge, was not sufficiently established as reliable and therefore, any reliance on such information invalidates the search warrant issued.

The test for substantiating the reliability of an informant is set forth in *United States v. Harris*, 403 U.S. 573 (1971). It is a three prong test and further refines the test set forth in *Jones v. United States*, 362 U.S. 257 (1960). In *Harris*, the Court held that the informant's statement would be sufficient as the basis for a search

warrant if: his observations were personal and recent; the affiant alleged knowledge of prior criminal conduct on the part of the defendant and recited a particular event in support of that allegation; and the information supplied by the informant was an admission against the informant's own penal interest. It is the third prong with which the Petitioner herein is concerned.

The indication that the informant was making an admission against his own penal interest is not necessarily as clear as it might appear at first viewing. Mr. Charles had just been arrested for a violation of the narcotics law. Colorado law differentiates between crimes of possession narcotics and possessing narcotics with intent to sell them. C.R.S. 48-5-2 (1963); C.R.S. 48-5-20 (Supp. 1971). The possession of narcotics with intent to sell or the dispensing of narcotics carries with it a greater possible sentence than mere simple possession of narcotics. See C.R.S. 48-5-20 (Supp. 1971). Mr. Charles found himself in somewhat of a predicament at the time of his arrest, being confronted with the possibility of being charged with the possession of narcotics with intent to sell or distribute as opposed to simple possession. It therefore follows that in an attempt to extricate himself from the greater of two evils, Mr. Charles may well have indicated that rather than going to the residence of the Petitioner for purposes of his selling narcotics to Mr. Segura, he might fabricate that Petitioner was in fact selling narcotics to him, thereby removing suspicion of the commission of that act from himself and placing such suspicion on the Petitioner. This argument is substantiated by the fact that subsequent to the execution of the search warrant, as reflected on page 31 of the record, Volume I, no alleged narcotics were discovered

in Petitioner's residence but only alleged narcotics paraphenalia.

For the aforementioned reasons, the Petitioner would urge that the Appellate Court in determining whether or not the District Court was in error as to its finding that there was in fact probable cause for the issuance of a search warrant of Petitioner's residence should have given little or no weight, without additional evidence, to Mr. Charles' information. In *United States v. Harris*, 403 U.S. 573 (1971), Justice Harlan in his dissenting opinion in reviewing the affidavit in that case had the following comment relating to the reliance of a statement made by an informant against his own penal interest:

> . . . [W]here the declarant is also a police informant it seems at least as plausible to assume, without further enlightenment either as to the Government's general practice or to the particular facts of this case, that the declarant-confidant at least believed he would receive absolution from prosecution on his confessed crime in return for his statement.
>
> . . . Thus, some showing that the informant did not possess illusions of immunity might well be essential.

Justice Harlan further indicates that with respect to a continued belief that declarations against penal interest are more trustworthy than mere observations by an informant of criminal activity that:

> . . . [T]he effect of adopting such a rule would be to encourage the Government to prefer as informants participants in criminal enterprises rather than ordinary citizens, a goal the Government specifically eschews in its brief in this case upon the explicit

premise that such persons are often less reliable than those who obey the law.

It is for these particular reasons that this Court should require more of the informant providing the hearsay information in this affidavit than relying on the somewhat dubious concept that he has "in fact" made a declaration against his own interests. There is no indication that the Court of Appeals was concerned with the informant's belief as to whether or not his statement would enhance his position relating to any criminal offense he might have committed. As previously stated, Mr. Charles could also have very well conceived the notion that as a result of giving this statement to the affiant, the Petitioner rather than Mr. Charles would be prosecuted for the distribution of narcotics. All of these facts considered, the Appellate Court should require that the Judge permitting such warrant to issue should demand more substantiation and investigation prior to allowing execution of the search warrant. It is important to note that the execution of the search warrant, as previously stated, did not lead the investigating officers to any narcotics but only narcotics paraphenalia which would not even provide after the fact substantiation of Mr. Charles claim against the Petitioner.

If these alternative methods of substantiating an informant's statement set forth in *Harris* are not complied with, then in ascertaining the lower court's finding of the sufficiency of the affidavit the Appellate Court should have fallen back on the requirements in *Jones v. United States,* supra; that the informant needs to have given previously reliable information to be considered "reliable". For purposes of this argument, Mr. Charls should be treated as an informant. It is with this

degree of suspicion that his statement should be reviewed in light of his particular position and involvement with law enforcement officials when those statements were being given. Clearly, there is no indication on the affidavit that Mr. Charles had ever given previously reliable information to law enforcement officers. Therefore, under the *Jones* decision, Mr. Charles' testimony cannot stand as the basis for the affidavit and should have been delted therefrom, in determining whether or not sufficient probable cause existed for the issuance of a search warrant in the instant case.

Without Charles' statement, the affidavit supporting the search warrant clearly fails for a lack of information and, as such, the search warrant was executed and issued in violation of Petitioner's rights under the Fourth and Fourteenth Amendments to the United States Constitution. Consequently, the Court of Appeals should not have sustained the trial courts denial of Petitioner's Motion to Suppress all evidence discovered as a result of the execution of the search warrant in question.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to the judgment and opinion of the Tenth Circuit.

Respectfully submitted,
W. ROBERT MONTGOMERY
720 Kipling, Suite 14
Lakewood, Colorado 80215

UNITED STATES DISTRICT COURT

for the

District of Colorado

No. 73-CR-222

United States of America

v.

JOE SEGURA, JR.

On this 23rd day of November, 1973 came the attorney for the government and the defendant appeared in person and[1] by court appointed counsel.

It is Adjudged that the defendant upon his plea of[2] not guilty and a verdict of guilty on October 23, 1973, has been convicted of the offense of possession of an unregistered firearm, in violation of Title 26, U.S. Code, Section 5861(d) and 5871, and Title 18, U.S. Code, Section 2, as charged[3] in indictment filed 7/12/73 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his au-

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[1] "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desird to have counsel appointed by the court, and the defndant thereupon stated that he waived the right to the assistance of counsl."

[2] (1) "guilty and the court beisg satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo costendere," as the case may be.

[3] "in count(s) number " if required.

thorized representative for imprisonment for a period of[4] five (5) years.

IT IS FURTHER ADJUDGED that defendant receive such treatment as may be necessary for drug addiction.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommend commitment to[6]

FRED M. WINNER
United States District Judge.

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[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence: (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension asd probation.

[6] For use of Court to recommend a particular institution.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1061

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
JOE SEGURA, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the District of Colorado (D.C. No. 73-CR-222)

Arthur H. Bosworth, II, Assistant United States Attorney, Denver, Colorado (James L. Treece, Usited States Atorney, Denver, Colorado, on the brif), for Plaintiff-Appellee.

W. Robert Montgomery, Lakewood, Colorado, for Dfendant-Appellant.

Before HILL and DOYLE, Circuit Judges, and TALBOT SMITH,* District Judge.

DOYLE Circuit Judge.

* Honorable Talbot Smith, United States District Judge, Ann Arbor, Michigan, sitting by designation.

Defendant-appellant seeks reversal of a judgment of conviction which was entered against him in a possession of a firearm case.

The indictment charged that on April 30, 1973, at Pueblo, Colorado, defendant-appellant did knowingly and unlawfully possess a firearm defined by 26 U.S.C. §5845 as a destructive device described as a U.S. military type grenade simulator wrapped with black plastic electrical tape and having 17 screws. It was further alleged that the firearm was not registered to the said Joe Segura, Jr. in the National Firearms Registration and Transfer Record, contrary to 26 U.S.C. §§5861(d) and 5871.

The facts leading up to the return of the indictment establish that on April 29, 1973, a Pueblo Police Officer, Daniel B. Snell, arrested one Delano Rolando Charles. The officer had been maintaining a surveillance of the apartment of defendant-appellant, which apartment was located at 1911 East Evans in Pueblo. The surveillance had been carried out in a parking lot behind the Segura residence.

The officer saw two parties in a vehicle behind Segura's residence, and one of them, later identified as Charles, was observed entering the residence of Segura. A short time, later, Charles left the Segura apartment, entered the vehicle and at that time he was carrying several balloons and a plastic baggie which he handed to the driver of the vehicle. After a short conversation, the two men drove off. They were subsequently stopped by Officer Snell and Charles was placed under arrest for possession of heroin and marijuana.

Subsequently, Charles stated to Officer Snell that he had been buying heroin from Joe Segura for a period

of two years on the average of three or four times each week. On April 27, 1973, he went to the Segura apartment and made a purchase, and on April 28, 1973, he again went to the Segura apartment and purchased a quantity of heroin from Segura. On that occasion, while in the kitchen, he observed a number of plastic wrapped baggies of green vegetable material substance and was told by Segura that this was marijuana. Customarily when Charles purchased heroin from Segura the latter went to the bathroom, returned to Charles and sold him the amounts of heroin which he wished to buy. On April 29, 1973, he went to the apartment and as was usual Segura went to the bathroom and returned with a quantity of heroin and took back the remaining heroin to the bathroom.

All of this was incorporated into an affidavit attached to a search warrant which was issued on April 29, 1973. The warrant ordered the search of the Segura apartment at 1911 East Evans, Apt. E, Pueblo, Colorado. This affidavit also contained statements from the officer that he had seen Segura occupying that particular apartment previously, that on September 2, 1972, Segura had been arrested for violation of narcotics laws, and that case is pending in court.

Following the issuance of the search warrant, Snell and other officers went to the Segura apartment at the mentioned address. In searching the premises, the grenade in question was found in the bedroom on top of a four foot tall dresser. This grenade was taken from the bedroom and through the living room. As it was being removed, Mrs. Segura exclaimed: "Don't mess with that or it will go off, or it will blow up" or words to that effect.

The evidence showed that Dorothy Segura was not the defendant's wife, but that she and her child lived in the apartment with him. Mrs. Segura testified for the defendant, stating that since April 19, 1973, she had been staying in that apartment with Joe Segura and had remained there until the search. She said that neither of the bureaus in the bedroom were hers and that she did not keep clothes in them. She stated that the first time she saw the bomb was when an individual known as "Frenchie" brought it into the house on April 20, 1973. Segura had told him to "put it away, put it down and take it with you when you leave." However, two days later she again saw the grenade under the couch. She was the one who removed it and put it on top of the dresser so that it would remain out of the reach of her daughter. According to her, the bomb remained there for five days thereafter.

The contentions advanced by defendant-appellant are, first, that the court erred in denying defendant-appellant's motion for acquittal. The argument is that there was not offered sufficient evidence in support of his conviction under the relevant statute, 26 U.S.C. §§5861(d) and 5871.

The second point offered is that the trial court erred in denying appellant's motion to suppress certain evidence seized pursuant to the execution of the search warrant; it is said that the warrant was issued on insufficient evidence.

I.

We are of the opinion that the evidence is sufficient. First, the apartment had been rented by the appellant

and he had lived there for some period of time. There is evidence to establish that he was aware of the presence of the grenade. Indeed, the evidence established that it was in plain sight on top of the bureau in the bedroom. In essence, the argument is that the evidence failed to establish possession in defendant-appellant. It is said that the presence of the grenade in the apartment and on the dresser is insufficient. We disagree. The evidence establishes that the grenade was not in the possession of Dorothy Segura, and indeed it was discovered by the officers in the course of a valid search of Joe Segura's apartment. We fail to see how it can be reasonably maintained in view of this that possession was not established. Possesion may be proved by establishing either actual or constructive possession. *See* Sanders v. United States, 441 F.2d 412 (10th Cir. 1971); Amaya v. United States, 373 F.2d 197 (10th Cir. 1967).

Mrs. Segura was at most a casual resident and not a permanent one. Accordingly, it is reasonable to conclude that Joe Segura had exclusive possession of the apartment; the evidence is adequate to establish this fact. *Cf.* United States v. Henry, 468 F.2d 892 (10th Cir. 1972), wherein the narcotics were seized from a motor home which the accused there was shown to have been driving. The defendant there had admitted that he was the owner in possession of the vehicle. Similarly here defendant was in exclusive possession of the premises and the jury was fully justified in rejecting the attempted explanation of the witness Dorothy Segura as to the source of the grenade.[1]

[1] The law applicable to search and seizure of articles in plain view is fully expounded in the opinion of the Supreme Court in Coolidge v. New Hampshire, 403 U.S. 443 (1971), at 465 and 466 as follows:

An example of the applicability of the "plain view" doc-

II.

Based on a careful scrutiny of the search warrant and the affidavit, we conclude that the facts contained therein were quite adequate to justify the issuance of a search warrant. The factual detail set forth in the affidavit together with the corroboration offered by the police officer who observed the transaction (the external evidences of the heroin sale) fully justified issuance. Cf. Spinelli v. United States, 393 U.S. 410 (1969); Draper v. United States, 358 U.S. 307 (1959). The face of the affidavit discloses that the apartment was definitely that of Segura and that Charles unquestionably entered the apartment of Segura and purchased heroin on the very day. The affidavit also revealed that Segura was regularly engaged in selling narcotics.[2]

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trine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character. Cf. Go-Bart Importing Co. v. United States, 282 U.S. 344, 358, 51 S. Ct. 153, 158, 75 L.Ed. 374; United States v. Lefkowitz, 285 U.S. 452, 465, 52 S.Ct. 420, 76 L.Ed. 877; Steele v. United States, 267 U.S. 498, 45 S.Ct. 414, 69 L.Ed. 757; Stasley v. Georgia, 394 U.S. 557, 571, 89 S.Ct 1243, 1251, 22 L.Ed.2d 542 (Stewart, J., conurring in result). Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate. Thus the police may inadvertently come across evidence while in "hot pursuit" of a fleeing suspect. Warden v. Hayden, *supra*; cf. Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898. And an object that comes into view during a search incident to arrest that is appropriately limited in scope under existing law may be seized without a warrant. Chimel v. California, 395 U.S., at 762-763, 89 S.Ct. at 2039-2040. Finally, the "plain view" doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object. Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067; Frazier v. Cupp, 394 U.S. 731, 89 S. Ct. 1420, 22 L.Ed.2d 684; Ker v. California, 374 U.S., at 43, 83 S. Ct., at 1635. Cf. Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312.

[2] Defendant argues that it was essential for the affidavit to establish the reliability of Charles. But this is not a case in which the informant was not identified. *Cf.* Draper v. United States, *supra*.

From the facts set forth above and the other facts, we are of the opinion that the court was fully justified in issuing the warrant and that the contention of defendant-appellant that the motion to suppress should have been granted is wholly lacking in merit.

The judgment of the district court is affirmed.

SEPTEMBER TERM — OCTOBER 9, 1974

Before Honorable Delmas C. Hill and Honorable William E. Doyle, Circuit Judges, and Honorable Talbot Smith, District Judge.*

*Sitting by designation.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOE SEGURA, JR.,
Defendant-Appellant.
No. 74-1061

This matter comes on for consideration of Appellant's Petition for Rehearing which was "received but not filed" and forwarded to the Court for consideration.

Upon consideration whereof, the Petition for Rehearing is denied.

HOWARD K. PHILLIPS
Clerk

A true copy
Teste

Howard K. Phillips
Clerk, U.S. Court of Appeals,
Tenth Circuit

By ANNE CABOT
Deputy Clerk

SUPREME COURT OF THE UNITED STATES

No. A-395

JOE SEGURA, JR.,

Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 8, 1974.

S/ BYRON R. WHITE
Associate Justice of the Supreme
Court of the United States

Dated this 12th day of November, 1974

CERTIFICATE OF MAILING

This is to certify that I mailed three printed copies of the instrument to which this certification is attached to the following named persons, this 5th day of December, 1974:

James L. Treece
United States Attorney
Room 323, United States Courthouse
Denver, Colorado 80202

Solicitor General for the United States
Washington, D.C.

W. ROBERT MONTGOMERY
Attorney for Defendant-Appellant